Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FERRELLGAS, INC. AND GILBERT CANDELARIA,
Petitioners,

v.

ROYCE CLAY AND SHELLA SNIDER,
Respondents.

On Petiton for Writ of Certiorari to the Supreme Court of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment prohibits the retroactive imposition of punitive damages for violation of a substantive standard of liability that was created by judicial decision subsequent to the conduct for which the punishment was imposed.

2. Whether the Due Process Clause prohibits the imposition of liability for punitive damages for non-intentional conduct that was, measured under common-law rules, merely negligent.

LIST OF PARTIES

In addition to petitioner named in the caption, Gary Roybal was a defendant in the court below. Mr. Roybal settled with respondents prior to trial.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Ferrellgas, Inc. discloses that it has the following parent companies and non-wholly owned subsidiaries: Ferrell Companies, Inc. is the holding company that owns Ferrellgas, Inc. Ferrellgas, Inc. is the general partner of Ferrellgas Partners L.P., a publicly traded entity.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED .. 2

STATEMENT OF THE CASE 2

A. Statement of the Facts 2

B. Proceeding Below 5

1. The Trial Court Proceedings 5

2. The New Mexico Court of Appeals' Decision 6

3. The New Mexico Supreme Court's Decision 7

REASONS FOR GRANTING THE WRIT 9

A. The Court Should Decide Whether The Due Process Clause Prohibits The Imposition Of Punitive Damages For Violation Of A New, Retrospectively Applied, Standard Of Liability 10

B. The Court Should Decide Whether The Due Process Clause Prohibits The Infliction Of Punitive Damages For Merely Negligent Conduct 15

CONCLUSION 25

APPENDIX A 1a

APPENDIX B 15a

APPENDIX C 19a

TABLE OF AUTHORITIES

Cases	Page
Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813 (1986)	12
Alaskan Village, Inc. v. *Smalley*, 720 P.2d 945 (Alaska 1986)	15
Bouie v. *City of Columbia*, 378 U.S. 347 (1964)	11
Coryell v. *Colbaugh*, 1 N.J.L. 77 (1791)	16
Couillard v. *Bank of New Mexico*, 548 P.2d 459 (N.M. Ct. App. 1976)	13
Day v. *Woodworth*, 54 U.S. (13 How.) 362 (1852)	17
DeVeau v. *Braisted*, 363 U.S. 144 (1960)	12
Gasway v. *The Atlantic & West Point R.R. Co.*, 58 Ga. 216 (1877)	22
Goddard v. *Grand Trunk Ry. Co.*, 57 Me. 202 (1869)	22
Gonzalez v. *Sansoy*, 703 P.2d 904 (N.M. Ct. App. 1984)	12
Grimshaw v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)	14
Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994)	9,15
Horton v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985)	24
Huckle v. *Money*, 95 Eng. Rep. 768 (K.B. 1763)	16
Kaiser Aluminum & Chemical Corp. v. *Bonjorno*, 494 U.S. 827 (1990)	11

Kelsay v. *Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978) 14

Lake Shore & Michigan Southern Ry. v. *Prentice*, 147 U.S. 101 (1893) 19,21

Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994) 9,11

Linsley v. *Bushnell*, 15 Conn. 225 (1842) 16

Louis Vuitton S.A. v. *Spencer Handbags Corp.*, 765 F.2d 966 (2d Cir. 1985) 12

Massachusetts Bonding & Ins. Co. v. *United States*, 352 U.S. 128 (1956) 20

Milwaukee & Saint Paul Ry. Co. v. *Arms*, 91 U.S. 489 (1875) 18,19

Missouri Pacific Ry. Co. v. *Humes*, 115 U.S. 512 (1885) 19

Molzof v. *United States*, 112 S. Ct. 711 (1992) 16,17,20

Multiplex Ins. Agency v. *California Life Ins. Co.*, 189 Cal. App. 3d 925, 235 Cal. Rptr. 12 (1987) .. 14

Murphy v. *City of Topeka-Shawnee County Dep't. of Labor Services*, 630 P.2d 186 (Kan. Ct. App. 1981) 14

Nees v. *Hocks*, 536 P.2d 512 (Or. 1975) 13

Pacific Mutual Life Ins. v. *Haslip*, 499 U.S. 1 (1991) 23,24

Peterson v. *Superior Court*, 642 P.2d 1305 (Cal. 1982) 14

Philadelphia, Wilmington & Baltimore R.R. Co. v. *Quigley*, 62 U.S. (21 How.) 202 (1858) 17

Phipps v. *Clark Oil & Refining Co.*, 408 N.W.2d 569 (Minn. 1987) 14

Samedan Oil Corp. v. *Neeld*, 577 P.2d 1245 (N.M. 1978) 13,21,22

Sears v. *Lyons*, 171 Eng. Rep. 658 (1818)..... 16

Scott v. *Donald*, 165 U.S. 58 (1897)..... 19

Skeels v. *Universal C.I.T. Credit Corp.*, 335 F.2d 846 (3d Cir. 1964) 22,23

Sliman v. *Aluminum Company of America*, 731 P.2d 1267 (Idaho 1987), *cert. denied*, 486 U.S. 1031 (1988) 15

Smith v. *Wade*, 461 U.S. 30 (1983) 18

Stone v. *Codman*, 32 Mass. (15 Pick.) 297 (1834) 16

Stroud v. *Denny's Restaurant, Inc.*, 532 P.2d 790 (Or. 1975)..... 22

Tillotson v. *Cheetham*, 3 Johns. 55 (N.Y. 1808)... 17

Tullidge v. *Wade*, 95 Eng. Rep. 909 (K.B. 1796) . 16

TXO Production Corp. v. *Alliance Resources Corp.*,113 S. Ct. 2711 (1993) 24

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975) 11

Western Union Telegraph Co. v. *Eyser*, 91 U.S. 495 (1875)..... 19

Wilkes v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763) ... 16

Federal Constitutional Provisions and Statute:

U.S. Const. amend. V (Due Process Clause)..... 11

U.S. Const. amend. XIV (Due Process Clause).... 2,11

U.S. Const. art. I, § 9 (Bill of Attainder Clause) .. 11

U.S. Const. art. I, § 10 (Ex Post Facto Clause).... 11

28 U.S.C. § 1257(a)..... 2

Court Rules

Supreme Court Rule 29.1 ii

Other Authorities

1 J. Kent, *Commentaries on American Law* (8th ed. 1854)..... 18

T. Sedgwick, *Measures of Damages* (4th ed. 1868)..... 18

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Ferrellgas, Inc.,

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v.

Royce Clay and Shella Snider,

Respondents.

**On Petition for
Writ of Certiorari to the
Supreme Court of New Mexico**

PETITION FOR A WRIT OF CERTIORARI

Ferrellgas, Inc. and Gilbert Candelaria respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of New Mexico.

OPINIONS AND ORDERS BELOW

The August 1, 1994 opinion of the Supreme Court of New Mexico is reported at 881 P.2d 11 (N.M. 1994), and reproduced in the Appendix ("App.") A, 1a-14a. That court's September 16, 1994 order denying rehearing and amending the August 1, 1994

opinion is unreported and reproduced in App. B, *infra*, 15a-18a. The July 1, 1992 opinion of the Court of Appeals of New Mexico is reported at 838 P.2d 487, and reproduced in App. C, *infra*, 19a-31a.

JURISDICTION

The Supreme Court of New Mexico denied rehearing on September 16, 1994. This petition for a writ of certiorari is being filed within ninety days of the denial of rehearing. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

This case involves the retroactive imposition of a $750,000 punitive damage award against Ferrellgas for the mere negligence of its employees based on a new substantive standard of liability recognized for the first time by the New Mexico Supreme Court in this case.

A. Statement of the Facts

In July 1986, respondent Shella Snider received an automobile as a gift from her boyfriend Dr. Boyd

Clement. Ms. Snider decided to convert the automobile so that it could be operated using liquid propane as well as gasoline. In late March or early April 1987, Dr. Clement took the automobile to Ferrellgas, a company that sells propane gas and appliances and performs services related to the use of such products, including automobile conversions. Ferrellgas had previously completed several such conversions for Dr. Clement. App. A, 3a.

A Ferrellgas employee, petitioner Gilbert Candelaria, began the conversion process by installing a propane tank in the trunk of the car. Although the evidence is somewhat confusing, Mr. Candelaria apparently thereafter put some propane in the tank in order to "leak-test" the tank. *Id.*

"Sometime in April [1987], . . . Ferrellgas told Clement that completion of the job would be delayed because some parts were not available." App. A, 4a. When the parts did not arrive for several months, Dr. Clement picked up the vehicle from another Ferrellgas employee, Gerald Schell.

Mr. Schell, who did not know that any propane had been put in the tank, released the car to Dr. Clement, but "told Clement that the tank had been installed and informed him that the car would not yet run on propane because the conversion had not been completed." *Id.* Mr. Candelaria, who had installed the tank inside the car's trunk, did not know the car would be released prior to completion of the conversion. *See id.* 3a.

For nearly four months after reclaiming the car from Ferrellgas, Ms. Snider drove the vehicle using regular gasoline without experiencing any difficulties. *Id.* 5a. She took the vehicle to a friend of Dr. Clement's, Gary Roybal, who moonlighted as an auto-mechanic, to complete the conversion to propane. Mr. Roybal, who had no relationship to Ferrellgas, completed the adaptation of the car's carburetion system. He removed, repainted and reinstalled the propane tank. Mr. Roybal "testified that he did not put propane in the tank," but he was aware that the tank contained propane when it was brought in for completion of the conversion. *Id.*

Mr. Roybal "leak-tested the parts of the conversion system that he had installed but did not test the tank" after he reinstalled it. *Id.* Nor did he check to see if a "vapor barrier" had been installed to seal the passenger compartment of the car from the trunk to protect occupants of the car from leaking gas because -- even though he had removed the tank and then reinstalled it in the trunk -- Mr. Roybal assumed that Ferrellgas had installed such a barrier. *Id.*

Mr. Roybal's "work made it possible for the vehicle to run on propane." *Id.* On September 13, 1987, Mr. Roybal released the car to Ms. Snider and Dr. Clement. One week later, Ms. Snider attempted to start the car. When she turned the ignition, a spark ignited propane that had leaked from a loose valve in the propane tank into the passenger compartment of the car, causing an explosion and injuring Ms. Snider and her passenger, respondent Royce Clay.

B. Proceedings Below

1. The Trial Court Proceedings

Ms. Clay and Ms. Snider filed suit against Ferrellgas, Mr. Candelaria and Mr. Roybal in the District Court of Bernallilo County, New Mexico, alleging negligence in connection with the conversion of Ms. Snider's car to propane fuel. Respondents settled their actions against Mr. Roybal, and the case went to trial. The jury found Ferrellgas and Mr. Candelaria 89% at fault and Mr. Roybal 11% at fault for respondents' injuries. App. A, 6a. It returned verdicts of $345,000 in compensatory damages and $375,000 in punitive damages in favor of Ms. Snider and $250,000 in compensatory damages and $375,000 in punitive damages in favor of Ms. Clay. *Id.*[1]

In its post-trial motions, Ferrellgas argued, *inter alia*, that there was insufficient evidence to submit the punitive damage issue to the jury because no Ferrellgas employee had acted with the "culpable mental state" required under New Mexico law to support such an

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[1] In the trial court, Ferrellgas stipulated that, if Mr. Candelaria had engaged in conduct that subjected him to punitive damages, Ferrellgas would accept responsibility for his conduct. The jury's verdict and the trial court's judgment assess joint and several liability for punitive damages against Ferrellgas and Mr. Candelaria. However, as discussed *infra*, the decisions of both the New Mexico Court of Appeals and the New Mexico Supreme Court make clear that Mr. Candelaria's conduct, standing alone, was insufficient to subject either him or Ferrellgas to punitive damages.

award. *See* Memorandum in Support of Motion for Judgment Notwithstanding the Verdict and New Trial, at 4. It also argued that the jury's $750,000 punitive damage verdict against Ferrellgas for the mere negligence of Mr. Candelaria and Mr. Schell violated the Due Process Clause of the Fourteenth Amendment. *Id.* The trial court, however, denied Ferrellgas' post-trial motions without opinion.

2. The New Mexico Court of Appeals' Decision

The New Mexico Court of Appeals reversed the $750,000 punitive damage award and affirmed the trial court's judgment in all other respects. App. C, 21a.

While Ferrellgas raised its federal due process challenge in the New Mexico Court of Appeals, *see* Supp. Br. at 6 n.2, the court did not reach that issue. Rather, it found that, "while there was evidence of negligence [in this case], we do not believe it rises to the level of culpability required for the imposition of punitive damages." *Id.* 26a-27a.

The court held that the conduct of Mr. Candelaria and Mr. Schell did not constitute the sort of malicious, intentional or reckless conduct that previously had been required to support an award of punitive damages in New Mexico, and, therefore, Ferrellgas could not be held liable for punitive damages. The court explained:

> We fail to see how there can be reckless indifference or any mental state more culpable than negligence unless there is some evidence of knowledge of

> gas in the tank. Here, there was no evidence of such knowledge. There was no evidence that Candelaria, who installed the tank without installing the vapor barrier or venting apparatus, knew that the car would be released. There was no evidence that Schell, who released the car, knew or should have known there was gas in the tank.

Id. 27a.

3. The New Mexico Supreme Court's Decision

On July 20, 1992, respondents filed petitions for writs of certiorari in the New Mexico Supreme Court asking that court to review the New Mexico Court of Appeals' judgment overturning the $750,000 punitive damage award. Ferrellgas opposed review, contending, among other things, that "the Court of Appeals' decision . . . does not contradict the decisions of this [the New Mexico] Supreme Court or any of the Court of Appeals' decisions." Ferrellgas' Combined Response to Petitions for Certiorari at 1 (filed July 30, 1992).

The New Mexico Supreme Court, however, granted review and, without any additional briefing or oral argument from the parties, reinstated the jury's $750,000 punitive damage verdict. The court did not take issue with the finding that "no individual employee [of Ferrellgas] demonstrated the requisite culpable mental state" for imposing punitive damages. App. A, 9a. Nor did it disagree with the proposition

that the individual employees involved were, at most, merely negligent. *See id.* But the court nonetheless held that punishment in the form of punitive damages could be imposed on Ferrellgas. It concluded that "acts of the employees should be viewed cumulatively to determine the mental state of a corporation," and that, when taken together, the negligent acts of Mr. Candelaria and Mr. Schell could be viewed as reckless conduct on the part of Ferrellgas that warranted punitive damages. *Id.* 11a.

The court adopted this new "cumulative negligence" theory of liability even though the jury had not been instructed on that theory. Nor did respondents raise the cumulative negligence theory in their petition for certiorari in the New Mexico Supreme Court.

Ferrellgas filed a motion for rehearing, arguing that retroactive application of the court's "*sua sponte* new rule" concerning cumulative negligence in this case would contravene limits on retroactive punishment embodied in the Due Process Clause. Brief in Support of Motion for Rehearing, at 20 (filed Aug. 16, 1994). Ferrellgas also argued that it violated the Due Process Clause to impose "punitive damages [against Ferrellgas] without the existence of a culpable mental state" in at least one individual employee. *Id.* at 3. Ferrellgas contended that the New Mexico Supreme Court's "new rule" permitting such punishment based on the "accumulation of non-culpable negligent acts" of different individual employees was a fundamentally unfair and complete departure from "'traditional practice'" that violated due process. *Id.* at 21 (quoting

Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331, 2339 (1994)).

On September 16, 1994, the New Mexico Supreme Court denied Ferrellgas' motion for rehearing. App. B, *infra*, 15a.

REASONS FOR GRANTING THE WRIT

The court below recognized the cumulative negligence rule for the first time in this case and applied it retrospectively to punish Ferrellgas for conduct that had occurred over seven years earlier. As this Court reiterated just last Term, such "[r]etroactive imposition of punitive damages . . . raise[s] a serious constitutional question." *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994).

Moreover, for more than two centuries, most state courts have refused to permit the imposition of punitive damages unless the conduct to be punished and deterred was deliberate, malicious, or wanton. In contravention of this widespread historical practice, the New Mexico Supreme Court's decision in this case permits punitive damages to be awarded against a corporation for negligent, unintentional, non-malicious conduct of its employees.

In short, this case raises important and substantial issues that warrant this Court's review.

A. The Court Should Decide Whether The Due Process Clause Prohibits The Imposition Of Punitive Damages For Violation Of A New, Retrospectively Applied, Standard Of Liability

In exercising their wide-ranging common-law authority to create and administer remedies for civil wrongs, state courts have the power to recognize new torts and modify the standards pursuant to which previously recognized torts provide a right to recover damages to compensate injuries. It has long been accepted that state courts may apply new standards to conduct occurring years before and require compensation for injuries caused even if it is necessary to recognize new duties or expand upon the permissible standards of conduct that existed at the time the tort was committed. Such a process is not necessarily unreasonable or unconstitutional in the context of the compensatory function of tort law. Punitive damages, however, raise entirely different considerations.

In some cases, including this one, punishment in the form of punitive damages has been imposed for conduct that was not clearly labeled punishable by the courts at the time it occurred. The Constitution, however, disfavors retroactive lawmaking, whether by legislatures or by courts, and for good reason:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of

> conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf, 114 S. Ct. at 1497 (quoting *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)) (footnote omitted).

The constitutional hostility towards retroactive lawmaking increases as the punitive character of the law increases. For example, the Bill of Attainder and Ex Post Facto Clauses, art. I, §§ 9, 10, create a nearly absolute ban on retroactive penal legislation, and the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit retrospective judicial enlargement of obligations imposed by the criminal law. *See, e.g., Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).

In *Landgraf*, this Court observed that "[t]he very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question." 114 S. Ct. at 1505 (citing *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1975) (Court would "hesitate to approve the

retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts."); *Louis Vuitton S.A.* v. *Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985) (retroactive application of punitive treble damage statute "would present a potential *ex post facto* problem")).

While *Landgraf* involved retroactive legislation, the Court has previously expressed reservations regarding the due process implications of "retrospective imposition of punitive damages under a new cause of action" formulated by the courts. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Such punishment, the Court declared in *Aetna*, "raise[s] important issues which, in an appropriate setting, must be resolved." *Id.* at 828-29.

The Due Process Clause, at a minimum, requires clear and prior notice of the standards by which conduct will be measured in the imposition of punishment by the government. But Ferrellgas had no notice in 1987 that it could be punished for the merely negligent acts of its employees in connection with their preliminary work on the conversion of Ms. Snider's automobile to propane. In fact, New Mexico law was clear that "mere negligence or inadvertence is *not* sufficient to support an award of punitive damages." *Gonzalez* v. *Sansoy*, 703 P.2d 904, 907 (N.M. Ct. App. 1984) (emphasis added). Moreover, prior to the decision below in this case, "'[t]he rule [was] well established in New Mexico that the principal . . . is

liable for punitive or exemplary damages *only* in cases where . . . the acts of the agent . . . were wanton, oppressive, malicious, fraudulent or criminal in nature.'" *Samedan Oil Corp.* v. *Neeld*, 577 P.2d 1245, 1247 (N.M. 1978) (quoting *Couillard* v. *Bank of New Mexico*, 548 P.2d 459, 461 (N.M. Ct. App. 1976)).

The court below made a clear and unpredictable break with these principles in this case, holding that Ferrellgas could be punished even though none of its employees' actions constituted the kind of malicious, intentional or reckless conduct previously required to support punitive damages and, indeed, each employee involved in this case was guilty of no more than simple negligence. Thus, this case squarely raises the important and recurring question whether retrospective imposition of punishment -- here, a $750,000 punitive damage award -- under a newly recognized legal standard violates the Due Process Clause.

Lower courts are divided over the question of retroactive punitive damages. For example, the Supreme Court of Oregon refused to impose punitive damages in a case in which it created a new cause of action, reasoning that "[i]f we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Nees* v. *Hocks*, 536 P.2d 512, 517 (Or. 1975). The Supreme Court of Illinois, following *Nees*, has held that "punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a

novel one." *Kelsay* v. *Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978). And, in *Phipps* v. *Clark Oil & Refining Co.*, 408 N.W.2d 569 (Minn. 1987), the Supreme Court of Minnesota explicitly declined to impose punitive damages pursuant to a new rule of law. *Id.* at 573; *see also Murphy* v. *City of Topeka-Shawnee County Dep't of Labor Services*, 630 P.2d 186, 193 (Kan. Ct. App. 1981) (recognizing new cause of action but refusing to allow punitive damages because "inasmuch as this is the first recognition of such a cause by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust").

In contrast, in *Peterson* v. *Superior Court*, 642 P.2d 1305 (Cal. 1982), the Supreme Court of California expressly rejected state and federal constitutional challenges to retrospective allowance of punitive damages to punish the defendant for "driving while intoxicated" even though the defendant's conduct occurred before that court's decision allowing punitive damages to be assessed in such cases.[2] The highest courts of Alaska and Idaho also have upheld the retroactive imposition of punitive damages. *See*

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[2] *See also Multiplex Ins. Agency* v. *California Life Ins. Co.*, 189 Cal. App. 3d 925, 235 Cal. Rptr. 12 (1987) (interpreting *Peterson* to allow retroactive imposition of punitive damages based on a new cause of action); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (rejecting defendant's "fair warning" *federal* due process argument even though the applicable standards of liability were created after the product was designed, manufactured, and purchased).

Alaskan Village, Inc. v. *Smalley*, 720 P.2d 945 (Alaska 1986) (announcing new rule of law but imposing punitive damages and declining on state law grounds to give the new rule only prospective punitive effect); *Sliman v. Aluminum Company of America*, 731 P.2d 1267 (Idaho 1987) (announcing, in a case "of first impression," that a component manufacturer has a duty to warn ultimate consumers of risks associated with the finished product's use, and, despite having created a new rule of law, affirming an award of punitive damages), *cert. denied*, 486 U.S. 1031 (1988).

Because tort law is constantly evolving and is for the most part judicially fashioned with very little supervision by state legislatures, it is important that this Court determine whether punitive fines may be exacted in civil tort cases in which no advance notice is given of the nature of the duty or the standard of conduct, the deviation from which provides the predicate for punishment.

B. The Court Should Decide Whether The Due Process Clause Prohibits The Infliction Of Punitive Damages For Merely Negligent Conduct

"As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2339 (1994). Indeed, where a litigant is deprived of traditional common-law protections "against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Id.* at 2340.

The New Mexico Supreme Court's decision here departs from traditional practice in two fundamental ways. First, the decision below conflicts with over two hundred years of judicial rejection of punitive damage awards for mere negligence. Second, the decision is inconsistent with traditional rules governing a corporation's liability for punitive damages based on acts of its employees.

The principle that punitive damages are imposed to "punish defendants for torts committed with fraud, actual malice, violence, or oppression," *Molzof* v. *United States*, 112 S. Ct. 711, 715 (1992), is "deeply rooted" in our jurisprudence. *Id.* at 717. Indeed, by the time the Fifth Amendment became part of the Constitution in 1791, courts had awarded punitive damages only where the conduct to be punished was "of the most atrocious and dishonorable nature." *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 91 (1791). Under eighteenth and nineteenth century Anglo-American jurisprudence, both English[3] and American[4] courts

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[3] *See Sears* v. *Lyons*, 171 Eng. Rep. 658 (1818) (wanton poisoning of poultry); *Tullidge* v. *Wade*, 95 Eng. Rep. 909 (K.B. 1796) (seduction of plaintiff's daughter); *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763) (false imprisonment by King's Messenger); *Huckle* v. *Money*, 95 Eng. Rep. 768 (K.B. 1763) (same).

[4] *See Linsley* v. *Bushnell*, 15 Conn. 225, 236 (1842) (punitive damages allowed "in cases of wanton or malicious injuries"); *Stone* v. *Codman*, 32 Mass. (15 Pick.) 297, 300 (1834) (forbidding punitive damages when action was not "a case of

limited the application of punitive damages to particularly egregious or intentional acts; mere negligence was *never* the basis of such awards.

This Court has confirmed time and again this "well-established common law meaning" of punitive damages. *Molzof*, 112 S. Ct. at 717. In *Day* v. *Woodworth*, 54 U.S. (13 How.) 362, 371 (1852), the Court observed that "where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff . . . something farther by way of punishment or example." The award "depend[ed] upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct." *Id.* at 371. The Court elaborated on this historically accepted meaning of punitive damages in *Philadelphia, Wilmington & Baltimore R.R. Co.* v. *Quigley*, 62 U.S. (21 How.) 202, 214 (1858), in which it described the standard under which they may be awarded as "[w]henever the injury . . . has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity." The Court was careful to specify that "malice" was not "merely the doing of an unlawful or injurious act"; rather, the act to be punished must have been "conceived in the spirit of mischief, or of criminal indifference to civil obligations." *Id.* at 214. Thus, prior to the ratification of the Fourteenth Amendment

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wilful wrong"); *Tilloston* v. *Cheetham*, 3 Johns. 55, 63 (N.Y. 1808) (allowing exemplary damages to address "evil example of libels").

in 1868, negligence was understood to be an insufficient predicate for the imposition of exemplary or punitive damages in civil actions brought by private persons.[5]

Less than a decade after ratification of the Fourteenth Amendment, this Court confirmed that "gross or ordinary negligence, [does] not authorize [a] jury to visit [a defendant] with [punitive damages]." *Milwaukee & Saint Paul Ry. Co.* v. *Arms*, 91 U.S. 489, 495 (1875). Finding error in a jury instruction that permitted a punitive award against a railroad company for gross negligence of the company's employees, the Court held that a jury may not award exemplary damages unless the tort "was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them." *Id.* at 493. "Gross negligence" was rejected as a punitive damage standard because, as this Court explained over a century later, it "was too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard." *Smith* v. *Wade*, 461 U.S. 30, 43 (1983). Indeed, the *Arms*

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[5] The commentators of that era reflected the Court's position. *See, e.g.*, 1 J. Kent, *Commentaries on American Law* 618 n.a (8th ed. 1854) ("in cases of loss without aggravation or intentional wrong, the law confines itself to a complete indemnity, without adding exemplary damages"); T. Sedgwick, *Measure of Damages* 545 & n.† (4th ed. 1868) (even fraud is insufficient to support punitive damages unless it is "accompanied by gross malice and manifest design to injure").

Court explicitly stated that the "absence of [reasonable] care" did not authorize the jury to award punitive damages; to grant such an award, there would have to have been "some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Arms*, 91 U.S. at 495.

The same day that *Milwaukee & Saint Paul Ry. Co.* v. *Arms* was decided, this Court explicitly rejected an award of punitive damages for a negligent omission. In *Western Union Telegraph Co.* v. *Eyser*, 91 U.S. 495, 496 (1875), the Court reversed a decision of the Supreme Court of the Territory of Colorado, holding that while the "omission" to give "proper warning" when men were constructing a telegraph line warranted an award of compensatory damages, "[i]n no view of the evidence was the court below justified in instructing the jury that exemplary damages could be recovered." *Id.* Because there was no evidence "to authorize the jury to consider this omission as willful" -- indeed, the evidence "rebut[ted] every presumption that there was any intentional wrong" -- the judgment awarding exemplary damages was reversed. *Id.*[6]

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[6] *See also Scott* v. *Donald*, 165 U.S. 58, 86 (1897) (punitive damages allowed "where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression"); *Lake Shore & Michigan Southern Ry. Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) (it is "well settled" that a jury may award punitive damages "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"); *Missouri Pacific Ry. Co.* v.

Thus, the courts of this nation have refused to condone awards of punitive damages for behavior that was merely negligent. "'By definition, punitive damages are based upon the degree of the defendant's culpability.'" *Molzof*, 112 S. Ct. at 715 (quoting *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 133 (1956)). Even the court below recognized that "[t]he purpose of punitive damages is to punish a wrongdoer," and "[t]o be liable for punitive damages, . . . [a] wrongdoer's conduct must rise to a willful, wanton, malicious, reckless, oppressive, or fraudulent level." App. A, 7a. It also expressly acknowledged that the "conduct of no individual employee [of Ferrellgas] demonstrated the requisite culpable mental state" to justify punishing them in their individual capacities. *Id.* 9a.[7] But the court nonetheless held that punitive damages could be imposed against Ferrellgas on the theory that the separate negligent acts of two individual employees, when added together, equalled recklessness on the part of their employer sufficient to sustain an award of

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Humes, 115 U.S. 512, 521 (1885) (dictum) (punitive damages allowed "whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury").

[7] Despite this acknowledgment, the court below left the judgment for punitive damages against Mr. Candelaria standing. That punishment, which cannot be justified even under the new rule adopted in this case, is fundamentally unfair and plainly unconstitutional.

punitive damages.[8] This holding cannot be reconciled with our common-law tradition and violates the Due Process Clause.

This "cumulative negligence" rule also is inconsistent with equally fundamental and well-established principles regarding the liability of a corporation for punitive damages based on the conduct of its officers and employees. Before imposing such liability against a corporation, at least one officer or employee must be shown to have acted with "such guilty intention . . . required in order to charge him with exemplary or punitive damages." *Lake Shore*, 147 U.S. at 107.

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[8] The court below expressed the view that Ferrellgas could be deemed reckless for its employees' aggregate negligence because "through its corporate policy (or lack thereof) [Ferrellgas] allowed Schell to be unaware of the conduct of Candelaria, and vice-versa, despite the fact that in all probability this ignorance would result in severe harm." App. A, 11a. But the jury was not instructed that it could impose punitive damages pursuant to that theory. Nor is there any evidence in the record that Ferrellgas' conversion of an automobile to propane had ever before resulted in an accident. More importantly, sustaining these punitive damages on that theory, even if it had been litigated, would involve precisely the kind of retrospective punishment that is violative of the Due Process Clause as discussed with respect to Question 1 above because the New Mexico courts had never recognized such a theory of liability for punitive damages. Indeed, as discussed in the text below, the law of New Mexico on this point prior to the decision in this case was flatly contrary to the rule announced in this case. *Samedan Oil Corp.* v. *Neeld*, 577 P.2d 1245 (N.M. 1978).

Indeed, in a decision rendered the year after the Fourteenth Amendment was ratified, the Supreme Court of Maine, after canvassing the nineteenth century case-law, expressed its understanding that a corporation could be held liable for punitive damages "for the willful and malicious acts of their agents." *Goddard* v. *Grand Trunk Ry. Co.*, 57 Me. 202, 223-24 (1869). But the *Goddard* court carefully distinguished cases that had rejected the imposition of punitive damages against corporations on the ground that in none of those cases "was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty." *Id.* at 223.

Thus, it has been understood that a corporation can be held liable for punitive damages only "if the conduct of the agent be such as that he, if principal, would have been so liable." *Gasway* v. *The Atlantic & West Point R.R. Co.*, 58 Ga. 216, 220, 221 (1877); *see, e.g., Stroud* v. *Denny's Restaurant, Inc.*, 532 P.2d 790, 793 (Or. 1975) ("if the servant's act is such as to render him liable for punitive damages, then the corporation is likewise liable for punitive damages"). Until the decision below, even New Mexico followed this universally accepted principle. *See, e.g., Samedan Oil Corp.* v. *Neeld*, 577 P.2d at 1247 (recognizing that corporation can be held liable for punitive damages for agent's acts only if such acts "'were wanton, oppressive, malicious, fraudulent or criminal in nature'") (citation omitted).

Skeels v. *Universal C.I.T. Credit Corp.*, 335 F.2d 846 (3d Cir. 1964), conflicts with the decision below in a factual context remarkably similar to that of this

case. The Third Circuit, applying Pennsylvania law, held that it was improper to combine separate, non-malicious acts of individual employees in order to find "wanton or outrageous behavior [by] the corporation." *Id.* at 852. As in the case at bar, none of the individual employees in *Skeels* had "acted in an outrageous way" and therefore could not be subjected individually to punitive damages. *Id.* Imposing punitive damages against the company under such circumstances, the court held, would have clashed with well-established principles:

> Established doctrine of respondeat superior may result in corporate liability for what the right hand . . . did in ignorance of inconsistent behavior of the left. But to telescope the two in order to characterize as outrageous what was, at worst, done in excusable ignorance of certain events, is in our view unwarranted. Pennsylvania goes further than many other states in imposing punitive damages, but we think it does not go this far.

Id.

The decision below not only flatly contradicts historical practice, but it is inconsistent with this Court's recent decisions concerning punitive damages. In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), the Court affirmed an $840,000 punitive damage award against a corporation based on the actions of its employee, but was careful to emphasize

that the employee's conduct amounted to "'intentional malicious, gross, or oppressive fraud.'" *Id.* at 23. In *TXO Production Corp.* v. *Alliance Resources Corp.*, the Court upheld a $10,000,000 punitive damage award, but again stressed that the alleged corporate wrongdoer had engaged in "malicious and fraudulent" conduct, had acted with "bad faith" and had employed a "scheme [that] . . . was part of a larger pattern of fraud, trickery and deceit." 113 S. Ct. 2711, 2721 (1993). Justice Kennedy, who expressed serious doubts about the constitutionality of the award in *TXO*, ultimately concurred in affirmance explicitly on grounds that "TXO acted with malice . . . . A case involving vicarious liability, negligence or strict liability might present different issues." *Id.* at 2725-26.

The New Mexico Supreme Court's decision raises issues of widespread significance and threatens further to expand exponentially the already exploding universe of cases in which punitive damages may be imposed. The rule adopted by the court below, which removes a crucial safeguard against arbitrary and capricious punishments against corporate entities, cannot help but encourage this trend to continue. This "novel theory of adding together several ordinary negligence factors to make out a case" for punitive damages could encompass "a multitude of cases not ordinarily thought of as" providing the basis for such punishment. *Horton* v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382, 391, 392 (Ky. 1985) (Stephenson, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

December 15, 1994

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ROYCE CLAY,

Plaintiff-Petitioner,

Filed Aug. 1, 1994

and

SHELLA SNIDER,

Defendant and Third-Party-Plaintiff-Petitioner,

vs.

NOS. 20,701 & 20,705

FERRELLGAS, INC., and GILBERT CANDELARIA,

Defendants-Respondents.

ORIGINAL PROCEEDINGS ON CERTIORARI
Rebecca Sitterly, District Judge

Pat Chowning
Albuquerque, NM — for Royce Clay

Felker, Ish, Hatcher, Ritchie, Sullivan & Geer, P.A.
Mark L. Ish
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Ralph Shamas
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OPINION

RANSOM, Justice

Ferrellgas, Inc., and Gilbert Candelaria appealed to the Court of Appeals from a personal injury judgment entered on a jury verdict awarding compensatory and punitive damages to Royce Clay and Shella Snider. The Court of Appeals affirmed the award of compensatory damages but reversed the award of punitive damages. Clay v. Ferrellgas, Inc., 114 N.M. 333, 838 P.2d 487 (Ct. App. 1992). We issued a writ of certiorari to the Court of Appeals to review the reversal of the award of punitive damages. Finding substantial evidence to support the jury verdict, we reverse the Court of Appeals.

Facts. Although there was conflicting evidence throughout the trial, we will view the evidence in the light most favorable to support the verdict. Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 89, 428 P.2d 625, 628 (1967). We draw all reasonable inferences and resolve all disputed facts in favor of he successful party and disregard all evidence and inferences to the contrary. Id. Applying this standard, we discern the following facts.

In July 1986 Snider received a car as a gift from her companion, Boyd Clement. Soon thereafter Snider and Clement decided to have the vehicle converted to run on liquid propane as well as on gasoline. Clement took the car to Ferrellgas, which had previously converted several other vehicles to propane use for him. He spoke with office manager Gerald Schell about the arrangements and left the car with Ferrellgas. As part of the deal, Clement purchased a used propane tank from Candelaria, a Ferrellgas employee. Candelaria proceeded to install the tank in the trunk of Snider's car. Candelaria testified that it was his practice to "leak-test" each tank he installed, but he could not recall if he leak-tested this tank. A tank cannot be tested for leaks unless it contains propane, and, to remove all of the propane after testing, the tank must be purged using an inert, nonflammable gas such as nitrogen. None of the Ferrellgas employees purged the tank at any time.

For safety reasons, state law requires that the area inside the vehicle where the tank is mounted be "gastight with respect to driver or passenger compartments and to any space containing . . . spark-producing equipment" and the area must be "vented outside the vehicle." Standards for the Storage and Handling of Liquefied Petroleum Gases, N.M. Liquefied Petroleum Gas Bureau, Engine Fuel Sys. Reg. 8-2.7(a)(1), 4 N.M. Reg. 282 (Jan. 27, 1993). Thus, before a tank may be mounted, the installer must place a sealed vapor barrier between the passenger compartment and the enclosure containing the tank (the trunk of the car in this case) and install an outside vent to protect vehicle occupants from the dangers of leaking gas. State law also requires that the tank be placed so that it may be filled from the outside of the vehicle "by permanently installing the remote filling connections . . . to the outside of the vehicle." Id. Reg. 8-2.7(b). Finally, according to the testimony of Ray Engstrom, the Liquefied Petroleum Gas Bureau Chief for New Mexico, a form detailing the work done on a vehicle ("Form 6") is to be filed with the state inspector's office when a tank is installed. The purpose of this requirement is to give the inspector an opportunity to double-check the installer's work and make sure it was done correctly. If more than one installer worked on the vehicle, the inspector checks to make sure each part of the work has been done properly.

Ferrellgas admitted that it knew of these safety requirements when it began the conversion of Snider's vehicle. In addition, Candelaria stated that he believed he was to do a complete conversion on Snider's vehicle. Sometime in April, however, Ferrellgas told Clement that completion of the job would be delayed because some parts were not available. After waiting for the parts for a few months, Clement went to pick up the vehicle. At this point Ferrellgas had not installed the vapor barrier between the passenger compartment and the trunk, had not vented the compartment with an outside vent, and had not completed the work necessary so that the tank could be remote-filled. Ferrellgas told Clement that the tank had been installed and informed him that the car would not yet run on propane because the conversion had not been completed. Ferrellgas did not, however, inform Clement that the tank might be dangerous or that the trunk had not been sealed.

Ferrellgas also did not file a Form 6 reporting the installation of the tank. Schell testified that he did not believe a form needed to be filed because the installation had not been completed. Engstrom, however, testified that a form should have been filed. Further, although Schell contended that he had completed over 100 propane tank installations, the state inspector's office could not find a single Form 6 filed by Ferrellgas. Ferrellgas did not offer any excuse for its failure to file the requisite forms.

Snider drove the vehicle for almost four months while waiting for the conversion parts. Because Ferrellgas was unable to obtain the parts, Clement took the car to Gary Roybal to complete the conversion. Roybal completed the adaptation of the car's carburetion system and removed the tank, repainted it, and repositioned it in the same place that Candelaria had installed it. Roybal leak-tested the parts of the conversion system that he had installed but did not test the tank or check to see if a vapor barrier was in place. Roybal testified that he did not check for a vapor barrier because he assumed that Ferrellgas had installed one when it installed the tank. He based his assumption on his belief that the propane tank had some fuel in it when Clement brought in the vehicle.

Although Roybal's work made it possible for the vehicle to be run on propane, Snider did not operate it in that manner because Clement was going to return the vehicle to Ferrellgas so that Ferrellgas could adapt the tank for remote filling. Clement and Snider testified that they did not put propane in the tank at any time. Roybal also testified that he did not put propane in the tank.

On September 20, 1987, Snider and Clay got in to the vehicle and attempted to start it. When Snider turned the key in the ignition, the car exploded and the ensuing burst of flames severely burned both Snider and Clay. The explosion occurred because the spark from the ignition ignited propane gas that had leaked from a faulty valve on the tank and migrated into the passenger compartment of the car. According to expert testimony, the vehicle was unsafe from the time it was picked up from Ferrellgas because there was

propane in the tank, and because the vehicle lacked a vapor barrier and proper venting.

Proceedings. Snider and Clay both brought actions against Ferrellgas and Roybal based on negligence and failure to warn. They each sought compensatory and punitive damages. Prior to trial Snider and Clay settled their claims against Roybal. At the conclusion of the trial the jury determined that Ferrellgas was eighty-nine percent at fault and Roybal was eleven percent at fault. The jury awarded Snider $345,000 in total compensatory damages and awarded Clay $250,000 in total compensatory damages. The jury also determined that the actions of Ferrellgas were reckless and grossly negligent and awarded each woman $375,000 in punitive damages.

Ferrellgas may be held liable for punitive damages. The Court of Appeals reversed the award of punitive damages because it did not believe that Ferrellgas had the requisite "culpable mental state" to be held liable for punitive damages.[1] 114 N.M. at 337-38, 838 P.2d at 491-92. The Court's belief appears to be based upon the absence of evidence showing that any single employee knew that the car was being released with propane in the tank and without the installation of a vapor barrier or proper venting. Id. at 338, 838 P.2d at 492. The Court also adopted the rule that the nature of conduct required to demonstrate a culpable mental state does not decrease as the risk of danger increases, citing for support Gleave v. Denver & Rio Grande Western Railroad, 749 P.2d 660 (Utah Ct. App. 1988). 114 N.M. at 338-39, 838 P.2d at 492-93. We disagree with the

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[1] Because the parties stipulated that liability would not be separated between Ferrellgas and its employees, this opinion has made reference to the specific employees only if necessary for clarity; all other references to Ferrellgas are general in nature and are intended to encompass the knowledge and actions of the employees that constituted the corporation's mental state and participation. The Court of Appeals properly took this same view of the corporate participation issue. 114 N.M. at 337, 838 P.2d at 491.

interpretation of the facts and the rule adopted by the Court of Appeals.

-The culpable mental state of a party may be characterized by the risk of danger. The purpose of punitive damages is to punish a wrongdoer. Sanchez v. Dale Bellamah Homes of New Mexico, Inc., 76 N.M. 526, 531, 417 P.2d 25, 29 (1966). To be liable for punitive damages, a wrongdoer must have some culpable mental state, McGinnis v. Honeywell, Inc., 110 N.M. 1, 9, 791 P.2d 452, 460 (1990), and the wrongdoer's conduct must rise to a willful wanton, malicious, reckless, oppressive, or fraudulent level, Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 747, 418 P.2d 191, 200 (1966). The Court of Appeals recognized these standards and adopted the rule in Gleave after inferring the trial court had ruled that "a less culpable mental state would be sufficient if there was a high degree of danger." 114 N.M. at 338, 838 P.2d at 492. We question the Court's inference in light of the trial court's finding in a post-trial hearing that the conduct of Ferrellgas rose to a level of recklessness. We need not address this inference, however, because we do not find it dispositve.

The adoption of Gleave by the Court of Appeals may be correct insofar as it holds that conduct falling below a level of recklessness would not support an award of punitive damages regardless of the risk of danger. Yet, as the risk of danger increases, the duty of care also increases, Cross v. City of Clovis, 107 N.M. 251, 254, 755 P.2d 589, 592 (1988). Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state. The circumstances define the conduct; a cavalier attitude toward the lawful management of a dangerous product may raise the wrongdoer's level of conduct to recklessness, whereas a cavalier attitude toward the lawful management of a nondangerous product may be mere negligence. In measuring punitive damages "the enormity and nature of the wrong" must be assessed. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989). We believe this is what the trial court had in mind when it indicated that the conduct of Ferrellgas rose to a level of recklessness because of the dangerousness of the product. Because of this, adoption of the rule in

Gleave is unwarranted and we reverse the Court of Appeals on this point.

-Substantial evidence supports the award of punitive damages. The Court of Appeals determined that while there was evidence to support a finding that Ferrellgas was negligent, that negligence did not rise "to the level of culpability required for imposition of punitive damages." 114 N.M. at 338, 838 P.2d at 492. We disagree.

In this case the jury was instructed that for it to find Ferrellgas liable for punitive damages it had to find that the acts of Ferrellgas were reckless and grossly negligent. Because the jury presumably followed this instruction, see SCRA 1986, 13-2002 (Repl. Pamp. 1991) (duty to follow instructions); Britton v. Boulden, 87 N.M. 474, 475, 535 P.2d 1325, 1326 (1975) ("It must be presumed that the jury understood and complied with the court's instructions."), it necessarily found that the conduct of Ferrellgas was reckless.[2] For punitive damages, "reckless" is defined as "the intentional doing of an act with utter indifference to the consequences." See SCRA 1986, 13-1827 (Repl. Pamp. 1991). The Court of Appeals determined that the conduct of Ferrellgas did not demonstrate a culpable mental state because determined that the conduct of Ferrellgas did not demonstrate a culpable mental state because the conduct of

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[2] We are urged by the New Mexico Defense Lawyers Association to eliminate the term "grossly negligent" because, notwithstanding the confusing inclusion of the word "negligence" in the term, it is synonymous with "reckless". The NMDLA would have us hold that conduct must be reckless to support an award of punitive damages. We need not discuss that issue in this case because we conclude that the conduct of Ferrellgas was reckless and the jury was instructed it had to find both reckless and grossly negligent conduct. Moreover, Ferrellgas conceded in its responses to the petitions for certiorari: "Whether 'gross negligence' provides a basis for submission of punitive damages to the jury was not disputed in this case; it unquestionably does." Amicus, of course, "must take the case . . . as it stands on appeal and amicus cannot assume the functions of a party." Nall v. Baca, 95 N.M. 783, 785-86, 626 P.2d 1280, 1282-83 (1980).

no individual employee demonstrated the requisite culpable mental state. The Court did not consider the cumulative effects of their actions.

The Court of Appeals incorrectly compartmentalized the conduct of the Ferrellgas employees. It should have viewed the actions of the employees in the aggregate to determine whether Ferrellgas had the requisite culpable mental state because of the cumulative conduct of the employees. We believe that Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 389 (Ky. 1985), illustrates how the "cumulative conduct" of employees may demonstrate corporate recklessness. Cf. Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758, 772 (Ky. 1990) (allowing evidence to be "viewed cumulatively" to prove malice in a libel action); Herron v. Tribune Publishing Co., 736 P.2d 249, 256 (Wash. 1987) (en banc) ("[A]lthough negligence, a failure to investigate, anger or hostility towards the plaintiff, or reliance on sources known to be unreliable would each alone be insufficient proof, when viewed cumulatively and in appropriate circumstances they may establish a clear and convincing inference of actual malice.").

In Horton, a family was awarded punitive damages after their house exploded because of the negligence of a gas company. In the early morning hours, the mother of the family had smelled gas and called the gas company to check for leaks. A service representative went to the house, determined that there was a leak outside the house, and concluded after a superficial inspection that closing the chimney damper would stop any gas from entering the house. He called the company to order a repair crew for the leak outside the house. The field supervisor of the repair crew arrived but did not inspect the house, even though he had been told that there was a slight odor of gas inside the house. The supervisor had the authority to order that the gas be turned off and could have evacuated the family, but he took neither of those actions. The house exploded approximately twenty minutes after the field supervisor arrived. The gas leaking from the break in the line outside the house had traveled along the gas lines to the inside of the house. Id. at 385-86.

The family presented evidence that for some months prior to the explosion the chief utility inspector for the state had urged the gas company to revise an emergency plan established to direct the handling of gas leak situations. The chief inspector provided the gas company with a model plan based on national standards that included the requirement that gas company personnel use gas detection meters instead of relying on their sense of smell. The court determined that had the gas company adopted the model plan the explosion would have been prevented. Id. at 387. The court stated:

> [W]hile no one suggests that the gas company or its employees intentionally injured the Hortons, these actions of the employees at the scene must be considered together with the policy and procedures of the gas company in training its employees to handle such emergencies .... Viewed cumulatively the evidence was sufficient for the jury to conclude that the totality of circumstances indicated "a wanton or reckless disregard for the lives, safety or property of other persons."

Id. at 387-88 (quoting standard by which jury was instructed for imposition of punitive damages). Based on this rationale, the court upheld the punitive damages award.

A dissenting justice argued against what he considered to be "the novel theory of adding together several ordinary negligence factors to make out a case of gross negligence." Id. at 391 (Stephenson, J., dissenting). We believe, however, that the dissent missed the focus of the majority's rationale.

> Here the acts of the managerial employees in establishing policy and procedures and in failing to do so, in training their personnel to handle situations such as the present one, and in their interaction with the Public Service Commission as indicated by their dealings with [the chief utility inspector] and their correspondence with the Commission, implicated the company as a whole in the charge of wanton or reckless disregard for the safety of others. Here liability for punitive damages is not based on a single,

> isolated unauthorized and unexpected act of negligence by an employee. The situation is not subject to the charge that the respondent is being punished when completely innocent and liable only vicariously.

Id. at 390. This rationale explains why "corporate indifference" in the face of serious risks of danger that should reasonably be foreseen in the handling of explosive gases justifies a finding of "utter indifference to the consequences."

The case at bar, like Horton, provides a perfect example of why the acts of the employees should be viewed cumulatively to determine the mental state of a corporation. The Court of Appeals exonerated Ferrellgas from paying punitive damages because neither Candelaria nor Schell knew what the other was doing. 114 N.M. at 338, 838 P.2d at 492. If we follow this analysis, Ferrellgas escapes liability because its employees failed to communicate with each other. The culpable mental state of the corporation, however, may be inferred from the very fact that one employee could be ignorant of the acts or omissions of other employees with potentially disastrous consequences. In this case Ferrellgas cannot be said to have been an innocent party; through its corporate policy (or lack thereof) it allowed Schell to be unaware of the conduct of Candelaria, and vice-versa, despite the fact that in all probability this ignorance would result in severe harm.

Viewed cumulatively, the evidence in this case supports an award of punitive damages. Ferrellgas employees testified that they knew of the state laws that required them to install a vapor barrier and to properly vent the trunk of the car when they installed the tank. Reading the requirements carefully shows that these steps must be taken before the tank is installed. See Engine Fuel Sys. Reg. 8-2.7. There is no question that they did not comply with these requirements. Further, in accordance with his usual practice, Candelaria leak-tested the tank when he installed it in the trunk and must have put some propane in it. No Ferrellgas employee, however, purged the tank of propane at any time. Thus, Candelaria knew or should have known that the tank contained propane.

After Candelaria installed the tank, some Ferrellgas employee telephoned Clement and told him to pick up his vehicle because Ferrellgas did not have the necessary parts to complete the conversion. Presumably, this was either Candelaria, who was working on the car, or Schell, who was the office manager and who had arranged the details of the propane conversion with Clement. At any rate, Schell released the vehicle to Clement with the tank installed. When Clement picked up the car, Schell did not tell him that the vapor barrier had not been installed and that the trunk had not been properly vented. Schell also did not check to see if the tank had been filled other than by opening a valve and smelling for gas.[3] He did not ask Candelaria if propane had been placed in the tank nor did he make sure that the tank had been purged. Similarly, Candelaria believed that he was to complete the conversion and thus knew or should have known that the vehicle had been released. Despite this, he did nothing to retrieve the vehicle or to warn Snider and Clement, even though he knew the risk of harm of releasing a vehicle in that unsafe condition. The net effect of these omissions was that Schell released a vehicle that was dangerously unsafe and in violation of state law.

Finally, there was sufficient evidence to prove that as a corporation Ferrellgas "displayed a cavalier attitude toward[] safety regulations." 114 N.M. at 338, 838 P.2d at 492. The fact that Schell had done over 100 conversions without ever filing a Form 6 shows that Ferrellgas did not care to have the state inspector's office double-check the work of its employees.[4] This cavalier attitude must be viewed in light of

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[3] Schell testified at trial that a person could not detect small amounts of propane by smelling the tank. Because Schell was trained and licensed in propane conversions, he may be presumed to have known that his actions would not suffice to determine if there actually was propane in the tank.

[4] The Court of Appeals acknowledged evidence from which the jury could have inferred that Ferrellgas employees displayed a cavalier attitude toward safety regulations, "including routinely failing to file forms designed to ensure that inspectors check gas installations for

the foreseeable risk of harm. An expert testified at trial that it would take approximately three ounces of propane (the equivalent of one-quarter of one can of soda) to make the trunk flammable. Further, it would take approximately three cups of propane (the equivalent of two cans of soda) to make the entire passenger compartment flammable. Thus, even residual propane left in a tank creates a potentially volatile and dangerous situation.

In Horton the court determined that the negligence of the employees coupled with the fact that the company ignored repeated suggestions to revise investigatory procedures

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safety." The Court then held, however, that "the jury was not instructed on this theory of liability and, therefore, it cannot form the basis of a punitive damage award." 114 N.M. at 338, 838 P.2d at 492. The Court cited Gonzales v. Sansoy, 103 N.M. 127, 130, 703 P.2d 904, 907 (Ct. App. 1984), for the proposition that conduct giving rise to a claim for punitive damages must be the same conduct for which compensatory damages are allowed. Cf. Sanchez v. Clayton, __ N.M. __, __ P.2d __ (1994) [No. 21,498, filed June 2, 1994] (holding that it is the establishment of a cause of action for compensatory or nominal damages that is determinative of the right to punitive damages).

We do not consider whether in the statement of a plaintiff's contentions, see SCRA 1986, 13-302(B) (Repl. Pamp. 1991), it is necessary to itemize each act or omission that the plaintiff argues and relies upon as constituting negligence that was the proximate cause of injury. Here, the jury properly was instructed in accordance with UJI 13-302(B) that the plaintiffs had the burden of proving that at least one of their itemized contentions was a proximate cause of the injuries and damages. As long as a jury finds in favor of a plaintiff on one such contention, the plaintiff's burden is satisfied. The jury is not logically precluded from considering evidence of other acts or omissions that were introduced and argued to the jury without objection, as occurred here in relation to the routine practice of ignoring forms. But that is not the point. The matter of ignoring forms constituted evidence, not of a contention of negligence and proximate cause, but of a mental state that was not an essential element of the underlying cause of action on which the jury was instructed.

constituted conduct that amounted to a wanton or reckless disregard for the lives, safety, or property of others. In this case Candelaria and Schell negligently allowed an unsafe vehicle to leave their possession. Further, Ferrellgas allowed its employees to violate state law by mounting propane tanks before installing the vapor barrier and proper venting and authorized or participated in Schell's continuing failure to file the proper forms which, had they been filed, probably would have prevented the harm to Snider and Clay. Given the high risk of harm that accompanies the handling of propane gas, the negligence of Schell and Candelaria and regular violation of safety regulations by Ferrellgas amounts to corporate indifference and reckless conduct. Cf. Horton, 690 S.W.2d at 387-88.

Conclusion. We conclude that the Court of Appeals was incorrect in its adoption of the rule set out by the Utah court in Gleave. In addition, we believe that the Court was incorrect in its determination that the evidence did not support the assessment of punitive damages. Thus, we reverse the Court of Appeals and affirm the judgment entered on the jury verdict awarding Clay and Snider punitive damages.

IT IS SO ORDERED.

/s/ RICHARD E. RANSOM, Justice

WE CONCUR:

/s/ SETH D. MONTGOMERY, Chief Justice

/s/ GENE E. FRANCHINI, Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

September 16, 1994

NOS. 20,701/20,705

ROYCE CLAY,

Plaintiff-Petitioner,

and

SHELLA SNIDER,

Defendant-Third-Party-Plaintiff-Petitioner,

vs.

FERRELLGAS, INC., and GILBERT CANDELARIA,

Defendants-Respondents.

ORDER

This matter coming on for consideration by the Court upon respondents' motion for rehearing and brief in support thereof, and the Court having considered said motion and supporting brief and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED, however, the opinion filed August 1, 1994, is amended by deletion and interlineation on pages three (3) and nine (9), as attached hereto.

[3]Schell contended that he had completed over 100 propane tank installations, the state inspector's office could not find a single Form 6 filed by Ferrellgas. Ferrellgas did not offer any excuse for its failure to file the requisite forms.

Snider drove the vehicle for almost four months while waiting for the conversion parts. Because Ferrellgas was unable to obtain the parts, Clement took the car to Gary Roybal to complete the conversion. Roybal completed the adaptation of the car's carburetion system and removed the tank, repainted it, and repositioned it in the same place that Candelaria had installed it. Roybal leak-tested the parts of the conversion system that he had installed but did not test the tank or check to see if a vapor barrier was in place. Roybal testified that he did not check for a vapor barrier because he assumed that Ferrellgas had installed one when it installed the tank. He based his assumption on his belief that the propane tank had some fuel in it when Clement brought in the vehicle.

Although Roybal's work made it possible for the vehicle to be run on propane, Snider did not operate it in that manner because Clement was going to return the vehicle to Ferrellgas so that Ferrellgas could adapt the tank for remote filling. Clement and Snider testified that they did not put propane in the tank at any time. Roybal also testified that he did not put propane in the tank.

On September 20, 1987, Snider and Clay got in to the vehicle and attempted to start it. when Snider turned the key in the ignition, the car exploded and the ensuing burst of flames severely burned both Snider and Clay. The explosion occurred because the spark from the ignition ignited propane gas that had leaked from a faulty valve on the tank and migrated into the passenger compartment of the car. According to expert testimony, the vehicle was unsafe from the time it was picked up from Ferrellgas because there was propane in the tank, and because the vehicle lacked a vapor barrier and proper venting.

Proceedings. Snider and Clay both brought actions against Ferrellgas and Roybal based on negligence and failure to warn. They each sought compensatory and punitive damages. Prior to trial Snider and Clay settled their claims against Roybal. At the conclusion of the trial

[9]employee, however, purged the tank of propane at any time. Thus, Candelaria knew or should have known that the tank contained propane.

After Candelaria installed the tank, some Ferrellgas employee telephoned Clement and told him to pick up his vehicle because Ferrellgas did not have the necessary parts to complete the conversion. Presumably, this was either Candelaria, who was working on the car, or Schell, who was the office manager and who had arranged the details of the propane conversion with Clement. At any rate, Schell released the vehicle to Clement with the tank installed. When Clement picked up the car, Schell did not tell him that the vapor barrier had not been installed and that the trunk had not been properly vented. Schell also did not check to see if the tank had been filled other than by opening a valve and smelling for gas.[3] He did not ask Candelaria if propane had been placed in the tank nor did he make sure that the tank had been purged. Similarly, Candelaria believed that he was to complete the conversion and thus knew or should have known that the vehicle had been released. Despite this, he did nothing to retrieve the vehicle or to warn Snider and Clement, even though he knew the risk of harm of releasing a vehicle in that unsafe condition. The net effect of these omissions was that Schell released a vehicle that was dangerously unsafe and in violation of state law.

Finally, there was sufficient evidence to prove that as a corporation Ferrellgas "displayed a cavalier attitude toward[] safety regulations." 114 N.M. at 338, 838 P.2d at 492. The fact that Schell had done over 100 conversions without ever filing a Form 6 shows that Ferrellgas did not care to have the

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[3] Schell testified at trial that a person could not detect small amounts of propane by smelling the tank. Because Schell was trained and licensed in propane conversions, he may be presumed to have known that his actions would not suffice to determine if there actually was propane in the tank.

state inspector's office double-check the work of its employees.[4] This

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[4] The Court of Appeals acknowledged evidence from which the jury could have inferred that Ferrellgas employees displayed a cavalier attitude toward safety regulations, "including routinely failing to file forms designed to ensure that inspectors check gas installations for safety." The Court then held, however, that "the jury was not instructed on this theory of liability and, therefore, it cannot form the basis of a punitive damage award." 114 N.M. at 338, 838 P.2d at 492. The Court cited Gonzales v. Sansoy, 103 N.M. 127, 130, 703 P.2d 904, 907 (Ct. App. 1984), for the proposition that conduct giving rise to a claim for punitive damages must be the same conduct for which compensatory damages are allowed. Cf. Sanchez

APPENDIX C

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

ROYCE CLAY,

Plaintiff-Appellee,

and **Filed July 1, 1992**

SHELLA SNIDER,

Defendant/Third-Party Plaintiff-Appellee,

vs. No. 11,623

FERRELLGAS, INC. and
GILBERT CANDELARIA,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF
BERNALILLO COUNTY
REBECCA SITTERLY, District Judge

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OPINION

PICKARD, Judge.

Royce Clay and Shella Snider sued appellants for personal injuries sustained when propane gas ignited and caused a fire in Snider's car while the women were seated in it. Appellants appeal from the jury verdict awarding Clay and Snider compensatory and punitive damages. Appellants contend that the trial court should have granted judgment in their favor because their actions were not the proximate cause of the accident, and that the trial court incorrectly submitted the issues of punitive damages and strict products liability to the jury. Other issues raised in the docketing statement but not briefed are deemed abandoned. See State v. Vogenthaler, 89 N.M. 150, 548 P.2d 112 (Ct. App. 1976). We reverse the award of punitive damages, but affirm in other respects.

FACTS

The evidence on various points was conflicting in this case. In discussing the facts pertinent to the issues raised on appeal, we construe the evidence in the light most favorable to the verdict. Barnes v. Sadler Assocs. Inc., 95 N.M. 334, 622 P.2d 239 (1981).

The car was a gift to Snider from her companion, Boyd Clement. After the transfer of ownership, Snider and Clement decided to have the car's fuel system altered so that it could run on liquid propane in addition to gasoline. Appellant Ferrellgas was in the business of selling propane gas and appliances, as well as providing related services. Appellant Candelaria was an employee of Ferrellgas. Although at least one other Ferrellgas employee, Gerald Schell, dealt with Clement on the conversion project, Schell was not named as a defendant. On appeal, appellants characterize themselves as Ferrellgas and make no distinction between the corporation and either or both of the employees. We do the same.

Clement asked Ferrellgas to make the necessary adjustments to convert the car to propane fuel. Part of the arrangements between Clement and Ferrellgas involved Clement's purchase of a used propane tank from

Candelaria, who installed the tank in the trunk of the car. Candelaria could not specifically recall whether he "leak-tested" the tank, but he admitted that it was his practice to leak-test each tank he installed. In order to test a tank for leaks, it must contain propane. In order to remove all propane from a tank, the tank must be purged with an inert, nonflammable gas, such as nitrogen.

Among other things, conversion to propane requires installation of a sealed barrier between the trunk of the car and the passenger compartment to protect vehicle occupants from the dangers of leaking gas. Because of its location, the presence or absence of such a barrier in this case would not have been immediately visible.

Ferrellgas admitted that it was aware that a tank containing propane must have a vapor barrier installed to protect vehicle occupants, and the tank must be vented to the outside so that if it leaks, gas escapes to the outside rather than remaining in the vehicle, where it poses a danger to occupants. Schell indicated that for a conversion to be legal, adjustments must be made so that the propane tank can be "remote-filled" from outside the vehicle's trunk.

Candelaria stated that although he originally undertook work on the car as a complete conversion job, Ferrellgas in fact did not do a complete conversion, apparently because of difficulty in obtaining some of the necessary parts. Because of the delay, Clement retrieved the car from Ferrellgas. At that point, Ferrellgas had only repainted and installed the propane tank. Ferrellgas had not vented the tank or placed a vapor barrier between the trunk and the passenger compartment or made the adjustments to allow for remote-filling. Clement was told that the car could not yet be run on propane due to the incomplete nature of the work, but he was not warned by Ferrellgas that the tank as installed was dangerous.

Clement subsequently took the car to mechanic Gary Roybal to complete the conversion. Roybal removed the tank, repainted it, and then repositioned it in the same manner that it had been installed by Ferrellgas. He also obtained the parts needed to finish the conversion and completed the adaptation of the car's carburetion system.

Roybal leak-tested only the parts of the conversion system that he had installed. He did not test the rest of the tank or remove the back seats of the car to see whether a vapor barrier was in place. He explained that he did not check for a vapor barrier because he assumed that Ferrellgas had placed one in the trunk when it initially installed the tank.

After Roybal's work, the car could be run on propane, but Snider did not operate it on propane because Clement still intended to take the car back to Ferrellgas so that it could adapt the tank for remote-filling. Neither Clement nor Snider ever put any propane in the tank prior to the accident. Roybal also denied placing propane in the tank. He was sure, however, that there was propane in the tank when he received the vehicle. On September 20, 1987, propane gas leaked from a faulty valve on the tank, migrated into the passenger compartment of the car, and exploded when Snider turned the key in the ignition. According to expert testimony at trial, the tank was unsafe and the explosion could have occurred any time after the car was picked up from Ferrellgas, given the presence of propane, the faulty valve, the lack of a vapor barrier between the trunk and the passenger compartment, and the lack of proper venting.

The jury determined that Ferrellgas was 89 percent at fault for the accident in that Candelaria or Schell was negligent or failed to provide adequate warnings. The jury held Ferrellgas liable to Clay for compensatory damages in the amount of $250,000, and to Snider in the amount of $345,000. In addition, the jury found that the actions of Ferrellgas were reckless or grossly negligent and awarded each woman punitive damages in the amount of $375,000.

PROXIMATE CAUSE

Ferrellgas argues that the trial court should have granted judgment in its favor because Roybal constituted an independent intervenor whose negligence was the sole proximate cause of the accident. We disagree.

Proximate and independent intervening cause questions are generally issues to be decided by the jury. See City of Belen v. Harrell, 93 N.M. 601, 603 P.2d 711 (1979); Rickerson v. State, 94 N.M. 473, 612 P.2d 703 (Ct. App.

1980). The proximate cause of an injury is "that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred." SCRA 1986, 13-305. The proximate cause of an injury need not be the last act, or nearest act, to the injury but may be one which actually aided in producing the injury, and proximate cause need not be the sole cause but merely a concurring cause. Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970). The test for whether an act constitutes an independent and intervening cause, on the other hand, is whether the act "`interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen.'" Harrell, 93 N.M. at 604, 603 P.2d at 714 (quoting Thompson v. Anderman, 59 N.M. 400, 411-12, 285 P.2d 507, 514 (1955)). The question of proximate cause "becomes a question of law only when facts regarding causation are undisputed and all reasonable inferences therefrom are plain, consistent and uncontradictory." Harless v. Ewing, 80 N.M. 149, 151, 452 P.2d 483, 485 (Ct. App. 1969).

In this case, the question of causation was in dispute. There was expert testimony to suggest that Ferrellgas was negligent in failing to provide a vapor barrier and venting for the tank; there was also evidence to suggest that Roybal was not as knowledgeable as he should have been and that he should have more thoroughly inspected the car to make sure it complied with applicable regulations requiring the installation of a vapor barrier and proper venting before returning it. Other evidence indicated that what made the tank in this case so hazardous was the presence of residual propane gas. Roybal testified that the tank had propane in it when the car was delivered to him, and that he assumed that the vapor barrier was in place because the tank was "live." Ferrellgas, however, denied leaving propane gas in the tank. Snider and Clement also denied putting propane in the tank.

In light of the conflicting evidence, the trial court was correct in refusing to direct a verdict for Ferrellgas and in submitting the issues of proximate and independent

intervening cause to the jury. See id.; see also Collins v. Perrine, 108 N.M. 714, 718, 778 P.2d 912, 916 (Ct. App. 1989) (adopting the Restatement (Second) of Torts § 442B (1965) and stating, "where the negligent conduct of an actor creates or increases the risk of . . . harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability"). Specifically, a reasonable jury could have found that Ferrellgas left propane in the tank, thereby leading Roybal to believe that the vapor barrier was in place. Under these circumstances, Roybal's work would not necessarily be an intervening cause as a matter of law. Therefore, the jury was properly instructed, and its findings against Ferrellgas on the issue of causation are supported by substantial evidence and will not be overturned by this court. See Sheraden v. Black, 107 N.M. 76, 79, 752 P.2d 791, 794 (Ct. App. 1988) ("A reviewing court does not weigh the evidence but looks to see whether the evidence, viewed in the light most favorable to upholding the verdict, affords substantial evidence for the verdict; if so, the verdict must be affirmed.").

PUNITIVE DAMAGES

Ferrellgas contends that the trial court erred in submitting the issue of punitive damages to the jury. Ferrellgas a argument is a simple sufficiency-of-the-evidence argument. It contends that there is "not one shred of evidence . . . [that] supports the submission of punitive damages." No issue is raised concerning an employer's liability for punitive damages based on actions of its employees. See Samedan Oil Corp. v. Neeld, 91 N.M. 599, 577 P.2d 1245 (1978) (outlining the limited circumstances under which employer is liable). No issue is raised concerning the submission of alternative theories of liability where one alternative is not supported by the evidence. See Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983) (remand necessary when one of several alternative theories is not supported). The issue, as presented to us, is whether "Ferrellgas had a culpable mental state" based on the conduct of any of its employees, and that is the only issue we address.

The purpose of punitive damages is to punish the wrongdoer and to serve as a warning to others. Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981). Because punitive damages are in the nature of punishment, there must be some evidence of a culpable mental state, such as recklessness or "utter indifference." Gonzales v. Sansoy, 103 N.M. 127, 130, 703 P.2d 904, 907 (Ct. App. 1984). In Ruiz, we indicated that evidence that the wrongdoer had knowledge of a dangerous situation and the means to avoid the danger yet disregarded known safety measures could tend to prove wanton and reckless negligence warranting imposition of punitive damages. See Ruiz, 97 N.M. at 202, 638 P.2d at 414; see also Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 734 P.2d 1258 (1987) (gross negligence may be shown by violation of a statute, utter disregard for the plaintiff's safety, or failure to warn of a dangerous condition when one is obligated to do so). The key factor in this case is knowledge of the dangerous situation or, alternatively, utter disregard for plaintiffs' safety.

Measured against the foregoing standards, we find that the trial court's decision to instruct the jury on punitive damages was not supported by the record. While there was evidence showing that Ferrellgas knew that installation of a live propane tank without proper venting and a vapor barrier was hazardous, there was no evidence tending to show Ferrellgas knew that the tank was live. While the evidence indicated that Ferrellgas took insufficient steps to conclusively determine whether, in fact, the tank contained residual propane in that it failed to purge the tank before allowing Clement to take the car, there was no evidence showing that it should have known there was gas in the tank based on this. Finally, while there was evidence from which the jury could have inferred that Ferrellgas employees displayed a cavalier attitude toward safety regulations, including routinely failing to file forms designed to insure that inspectors will check gas installations for safety, the jury was not instructed on this theory of liability and, therefore, it cannot form the basis of a punitive damage award. See Gonzales v. Sansoy (conduct giving rise to punitive damage claim must be same conduct for which compensatory damages are allowed). Thus, while there was evidence of negligence, we do not

believe it rises to the level of culpability required for imposition of punitive damages.

Plaintiffs contend that Ferrellgas demonstrated reckless indifference in installing the tank without a vapor barrier or venting apparatus in violation of the applicable code, in failing to purge the tank, and in releasing the car in such a dangerous state without warning. We cannot agree. We fail to see how there can be reckless indifference or any mental state more culpable than negligence unless there is some evidence of knowledge of gas in the tank. Here, there was no evidence of such knowledge. There was no evidence that Candelaria, who installed the tank without installing the vapor barrier or venting apparatus, knew that the car would be released. There was no evidence that Schell, who released the car, knew or should have known there was gas in the tank.

The trial judge indicated that Ferrellgas's actions were reckless because of the dangerousness of the product. To the extent that this was a ruling that a less culpable mental state would be sufficient if there was a high degree of danger, we disagree. We find the reasoning of Gleave v. Denver & Rio Grande Western Railroad Co., 749 P.2d 660 (Utah Ct. App. 1988), instructive in this regard. Gleave established that to warrant submission of the issue of punitive damages to the jury there must be evidence of (1) defendant's knowledge or constructive knowledge of a high probability of an accident, (2) highly unreasonable conduct, and (3) a high degree of danger involved. We conclude that plaintiffs did not show that Ferrellgas should have been aware of a high probability of an accident. The evidence does not demonstrate to us constructive knowledge of a high probability of an accident of the sort that occurred when there was no reason for the employee who released the car to have known there was gas in the tank, or for the employee who worked on the car to have known it would be released before conversion was complete.

While we have found Gleave's analysis instructive in this case, we would hesitate to apply it as a framework for all punitive damages cases. See DeMatteo v. Simon, 112 N.M. 112, 812 P.2d 361 (Ct. App. 1991) (utter indifference to the safety of others is a sufficient basis for imposing punitive damages). However, we have found it

helpful in dispelling the notion that as the degree of danger increases, the quality of negligence required for the imposition of punitive damages decreases.

Thus, we reverse the award of punitive damages. Ferrellgas has requested a new trial on the issue of liability and compensatory damages because prejudicial evidence relevant only to the issue of punitive damages was before the jury. No authority on point was cited for this requested relief and, therefore, we do not grant it. See Wilburn v. Stewart, 110 N.M. 268, 794 P.2d 1197 (1990).

STRICT PRODUCTS LIABILITY

Ferrellgas has briefed two claims under this point. First, it argues that it provided a service rather than a product and that recovery for defective service lies only in negligence and not strict products liability. Its second contention is that strict products liability for failure to warn does not apply to sellers of used products. Both of these arguments are premised upon the assumption that the jury was properly instructed on the theory of strict products liability and that Ferrellgas was thereby prejudiced. Our review of the record discloses, however, that the jury was not actually instructed on the theory of strict products liability. Therefore, we need not address Ferrellgas's strict liability issues as they are raised in the briefs.

The New Mexico uniform jury instructions on products liability in effect at the time of trial in this case were codified as SCRA 1986, 13-1401 to -1433. According to the "Directions for Use" accompanying the instructions, Uniform Jury Instruction Civil 13-1406, entitled "Strict products liability; care not an issue," is the "basic instruction defining strict products liability and, together with UJI 13-1407, must be used in every strict products liability case . . . ." Neither Uniform Jury Instruction Civil 13-1406 nor Uniform Jury Instruction Civil 13-1407, "Strict products liability; unreasonable risk of injury," was given in this case. Moreover, the "Directions for Use" accompanying Uniform Jury Instruction Civil 13-1408, "Strict liability; evidence," provide that:

> In a strict liability action, this instruction must be given when the court has admitted evidence of industry practices or customs. UJI 13-1405, a comparable instruction, applies to an action in negligence. UJI 13-1405 and 13-1408 are both given where evidence of industry practices or custom is introduced and plaintiff is proceeding on both theories of liability. This instruction shall be given following UJI 13-1407.

The record reflects that Uniform Jury Instruction Civil 13-1408 was not given in this case.

Rather, the court instructed the jury in accordance with Uniform Jury Instructions Civil 13-1402 to -1405 on negligence principles as they apply to suppliers. The court also instructed the jury on warnings in accordance with Uniform Jury Instructions Civil 13-1415 and -1418. Read as a whole, we believe that the jury instructions presented to the jury only a case of negligence.

The statement of the issues instruction, in accordance with Uniform Jury Instruction Civil 13-302, told the jury that plaintiffs had four theories of recovery: negligence in failing to properly seal and vent the car's trunk, negligence in failing to properly leak-test the tank and fittings and to purge the tank of propane before releasing the car, failure to warn of the necessity for proper venting and sealing of the tank, and failure to warn of the risk of injury associated with the presence of propane in the trunk. Consistent with these theories, the special verdict form asked the jury to decide whether Schell or Candelaria was negligent or if they failed to warn. The products liability instructions given did nothing more than explain the standard of care in terms of negligence for the failure-to-warn theories.

To be sure, the instruction on the duty to warn contained the following "products liability" language: "Under plaintiff's [sic] claim of 'products liability', a product presents an unreasonable risk of injury if put on the market without warning of a risk which could be avoided by the giving of an adequate warning." However, without instruction in accordance with Uniform Jury Instructions Civil 13-1406 and -1407, the jury was not told the effect of

a product's presenting an unreasonable risk of injury beyond what it was told in the negligence context. Uniform Jury Instructions Civil 13-1406 and -1407 tell the jury that the strict products liability rule applies, even though all possible care has been used and that the jury is not to consider the reasonableness of defendants' acts in a products liability case. Without these instructions, the jury in this case was not told of a separate theory of liability prejudicial to Ferrellgas.

As in Perfetti, Ferrellgas's arguments concerning strict products liability are misdirected because strict products liability was not submitted to the jury as a separate theory of recovery, and any tangential reference to products liability in the instructions was not sufficiently prejudicial to call for a reversal. See also Sheraden v Black, 107 N.M. at 80, 752 P.2d at 795 ("it is well settled in New Mexico that the function of a reviewing court on appeal is to correct erroneous results, not to correct errors that, even if corrected, would not change the result."). Since the products liability instructions in this case explained the standard of care in terms of negligence only, we need not discuss whether strict products liability applies to services or used goods because no issue concerning strict products liability was submitted to the jury. See Perfetti v. McGhan Medical. As there was sufficient evidence to sustain the jury's determination that Ferrellgas was negligent, the verdict will stand.

CONCLUSION

Based on the record before us, we affirm the trial court's refusal to direct a verdict in favor of Ferrellgas, but hold that the trial court erred in submitting to the jury the issue of punitive damages. We further hold that the trial court's limited reference to "products liability" in one instruction, in light of its failure to provide the other requisite instructions containing the law of strict products liability in New Mexico, constituted harmless error in this case. Ferrellgas was not prejudiced by the instructions as given. Accordingly, the judgment of the lower court is affirmed to the extent of the compensatory damage award and reversed to the extent of the punitive damage award.

IT IS SO ORDERED.

/s/ LYNN PICKARD, Judge

WE CONCUR:

/s/ WILLIAM BIVINS, Judge

/s/PAMELA B. MINZNER, Judge

Supreme Court, U.S.
FILED
JAN 13 1995
OFFICE OF THE CLERK

No. 94-1066

In The

Supreme Court of the United States

October Term, 1994

FERRELLGAS, INC., and GILBERT CANDELARIA,

Petitioners,

v.

ROYCE CLAY and SHELLA SNIDER,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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QUESTIONS AS PRESENTED BY PETITIONERS

1. Whether the Due Process Clause of the Fourteenth Amendment prohibits the retroactive imposition of punitive damages for violation of a substantive standard of liability that was created by judicial decision subsequent to the conduct for which the punishment was imposed.

2. Whether the Due Process Clause prohibits the imposition of liability for punitive damages for nonintentional conduct that was, measured under common-law rules, merely negligent.

TABLE OF CONTENTS

Page

QUESTIONS AS PRESENTED BY PETITIONERS ... i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

A. Statement of the Facts 2

B. Proceedings Below 4

1. The Trial Court Proceedings 4

2. The New Mexico Court of Appeals Decision 5

3. The New Mexico Supreme Court's Decision 5

REASONS FOR DENYING THIS WRIT 7

ARGUMENT 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

DeMatteo v. Simon, 112 N.M. 112, 812 P.2d 361 (Ct.App. 1991) 10

Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24 (1942) 10

Loucks v. Albuquerque National Bank, 76 N.M. 735, 418 P.2d 191 (1966) 9

Molzof v. United States, 502 U.S. 301, 112 S.Ct. 711 (1992) 8, 11

Sutherlin v. Fenenga, 111 N.M. 767, 810 P.2d 353 (Ct.App. 1991) 10

TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ___, 113 S.Ct. 2711 (1993) 11

RULES

Rules of the Supreme Court of the United States, Rule 10 8

No. 94-1066

In The

Supreme Court of the United States

October Term, 1994

FERRELLGAS, INC. and GILBERT CANDELARIA,

Petitioners,

v.

ROYCE CLAY and SHELLA SNIDER,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

The Respondents respectfully request that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

STATEMENT OF THE CASE

Respondents supplement and contradict the Petitioners' Statement of the Case as follows:

A. STATEMENT OF THE FACTS

The most conspicuous default in the Petitioners' presentation of the facts in this case is the curious failure to mention any of the omissions and violations of regulatory law which gave rise to the award of punitive damages. Significantly, the facts and circumstances which were neglected by the Petitioners are precisely those which influenced the Supreme Court of New Mexico to conclude that the acts of Ferrellgas and its employees in this case amounted to " . . . corporate indifference and reckless conduct." App. A, 14a. Respondents will summarize those facts herein.

Ferrellgas engages in the business of distributing propane and propane appliances. It also profits from converting fuel systems so that automobiles are made capable of running on propane. Since propane is highly flammable and can be extremely dangerous if mishandled, the State of New Mexico requires that commercial handlers and distributors such as Ferrellgas be licensed and be subject to safety regulations promulgated by the New Mexico LPG Bureau.

Ferrellgas undertook to convert Shella Snider's automobile to a propane fuel system, and for this purpose a propane tank was placed into the trunk of the car by Gilbert Candelaria. Regulations require that the tank be isolated from the passenger compartment and from any source of potential ignition. This must be accomplished

by installing a vapor barrier between the trunk and the passenger area *before* the tank is installed. App. A, 11a. This was not done by Gilbert Candelaria, nor was it done by any other Ferrellgas employee. *Id.* Regulations further require that the trunk of the automobile be vented to the outside *before* the tank is installed. *Id.* This also was not done. *Id.* Furthermore, the tank contained fuel as a result of being leak-tested by Gilbert Candelaria. This fuel was not purged from the tank. *Id.*

The automobile was released by the Ferrellgas manager, Gerald Schell, and he failed to warn that there was no vapor barrier. He likewise did not give warning that the trunk had not been vented to the outside. "Schell also did not check to see if the tank had been filled other than by opening a valve and smelling for gas. He did not ask Candelaria if propane had been placed in the tank nor did he make sure that the tank had been purged." App. A, 12a. Thus, he knew or should have known that the tank contained propane. *Id.* "Similarly, Candelaria believed that he was to complete the conversion and thus knew or should have known that the vehicle had been released. Despite this, he did nothing to retrieve the vehicle or to warn Snider . . . , even though he knew the risk of harm of releasing a vehicle in that unsafe condition. The net effect of these omissions was that Schell released a vehicle that was dangerously unsafe and in violation of state law." *Id.*

LPG Bureau regulations also require the licensee to file a Form 6 with the agency upon performance of any propane conversion or any partial conversion. The purpose of this requirement is to trigger an inspection by a state inspector to determine if the work is in compliance with the safety regulations. Ferrellgas never filed a Form

6 regarding the installation of the tank in Shella Snider's automobile. App. A, 5a. In fact, the evidence showed that Ferrellgas routinely failed to file any required Form 6 even though it had completed more than 100 tank installations, indicating " . . . that Ferrellgas did not care to have the state inspector's office double-check the work of its employees." App. A, 12a. Ferrellgas was not able to offer any explanation for its repeated violations of state law, and stipulated at trial that it participated in, authorized or ratified the acts of its employees with regard to the installation of the propane tank. App. A, 6a, n.1.

B. PROCEEDINGS BELOW

1. The Trial Court Proceedings

Respondents respectfully submit that Petitioners' statements regarding the post-trial motions are misleading and incomplete. Ferrellgas and Candelaria acknowledged to the trial court that punitive damages could be awarded upon a showing of recklessness or utter indifference and they simply argued the evidence. In response, the trial court found that there was sufficient evidence of recklessness and utter indifference. Additionally, Ferrellgas and Mr. Candelaria did not, as stated in the Petition, argue that they had been denied due process on the basis that punitive damages had been awarded for the mere negligence of Mr. Candelaria and Mr. Schell. They argued generally that punitive damages violated the Eighth Amendment to the United States Constitution and that punitive damages violate concepts of fundamental fairness. These arguments were properly rejected by the trial court.

2. The New Mexico Court of Appeals' Decision

It is simply a deception for Ferrellgas to state that it raised a federal due process "challenge" in the New Mexico Court of Appeals. The constitutionality of punitive damages was only mentioned in passing by Ferrellgas in a minor footnote contained in a supplemental brief. *See* Supp. Br., at 6, n.2. Therefore, contrary to the impression that Petitioners are now trying to convey to this Court, constitutional "challenges" were not presented on appeal in this case until after the Supreme Court of New Mexico decided against Ferrellgas on the common law and substantial evidence issues.

3. The New Mexico Supreme Court's Decision

While the New Mexico Court of Appeals felt that the punitive damage award was not supported by the evidence, the New Mexico Supreme Court disagreed and held that the punitive damage award was supported by substantial evidence. App. A, 8a. The New Mexico Supreme Court relied upon existing New Mexico precedent in stating the view that the conduct of the Ferrellgas employees, including that of its manager, Gerald Schell, has to be examined in light of the fact that they were dealing with a potentially dangerous substance. The New Mexico Supreme Court criticized its lower court for applying a Utah case to find to the contrary. App. A, 7a. In doing so, the New Mexico Supreme Court was careful to point out that recklessness is a touchstone for punitive damages, and was focusing on the nature of the product being handled. *Id.* The New Mexico Court of Appeals had

failed to recognize that a cavalier mishandling of a dangerous product by licensed professionals can amount to recklessness. *Id.*

The New Mexico Supreme Court further found that its lower court had been too restrictive in its view of the evidence and had failed to examine the conduct of the Ferrellgas employees, again including its manager, as a whole. The following language in that regard is contained in the New Mexico Supreme Court opinion:

> The case at bar, like *Horton*, provides a perfect example of why the acts of the employees should be viewed cumulatively to determine the mental state of a corporation. The Court of Appeals exonerated Ferrellgas from paying punitive damages because neither Candelaria nor Schell knew what the other was doing. 114 N.M at 338, 838 P.2d at 492. If we follow this analysis, Ferrellgas escapes liability because its employees failed to communicate with each other. The culpable mental state of the corporation, however, may be inferred from the very fact that one employee could be ignorant of the acts or omissions of other employees with potentially disastrous consequences. In this case Ferrellgas cannot be said to have been an innocent party; through its corporate policy (or lack thereof) it allowed Schell to be unaware of the conduct of Candelaria, and vice-versa, despite the fact that in all probability this ignorance would result in severe harm. App. A, 11a.

The New Mexico Supreme Court emphasized that the evidence supports the conclusion that Ferrellgas' corporate policies and procedures permitted its employees to engage in reckless conduct when it also said:

> Further, Ferrellgas allowed its employees to violate state law by mounting propane tanks before installing the vapor barrier and proper venting and authorized or participated in Schell's continuing failure to file the proper forms which, had they been filed, probably would have prevented the harm to Snider and Clay. Given the high risk of harm that accompanies the handling of propane gas, the negligence of Schell and Candelaria and regular violation of safety regulations by Ferrellgas amounts to corporate indifference and reckless conduct. *C.f., Horton,* 690 S.W.2d at 387-88. App. A, 14a.

In summary, therefore, the New Mexico Supreme Court simply reversed its lower court on issues involving the proper analysis and determination of substantial evidence.

REASONS FOR DENYING THE WRIT

The New Mexico Supreme Court did not adopt or apply any new or unique theory of liability in this case. Instead, it relied upon existing precedent and a review of the evidence to conclude that the jury's award of punitive damages was proper. Furthermore, contrary to Petitioners' gross mischaracterizations, the New Mexico Supreme Court was careful to state that punitive damages cannot be awarded for merely negligent conduct. The Supreme Court of New Mexico found substantial evidence that Ferrellgas employees were reckless and that Ferrellgas itself demonstrated a cavalier and indifferent corporate attitude toward safety.

There simply is no constitutional issue in this case, and no federal or constitutional question was raised in the New Mexico Supreme Court's opinion.

ARGUMENT

When the Petition in this case is compared with the actual written opinion of the Supreme Court of New Mexico, and when all proper facts are considered, it is apparent that the Petitioners have designed their Questions Presented in an attempt to embellish and decorate what is in fact a state law case involving only sufficiency of the evidence issues. In short, this case does not present "special and important" questions for review. *See* Rules of the Supreme Court of the United States, Rule 10.

This case has been tried to a jury upon instructions which required proof of recklessness for an award of punitive damages. App. A, 8a. The New Mexico jury instructions define "reckless" as "the intentional doing of an act with utter indifference to the consequences." *Id.* The jury, trial judge and Supreme Court of New Mexico all found that there was sufficient evidence of such utter indifference in this case, and no one can seriously quarrel with the deterrence of cavalier and reckless conduct in the handling of a potentially dangerous product and of the "regular violation of safety regulations." App. A, 14a.

Rather than focusing on the historical development of punitive damages in the federal courts, as Petitioners do, this Court's attention should be directed to New Mexico's state court development of punitive damages. *See Molzof v. United States*, 502 U.S. 301, 112 S.Ct. 711,

715-17 (1992). The New Mexico Supreme Court's decision in this matter is consistent with and supported by prior New Mexico case law, and punitive damages may be awarded in New Mexico when the conduct of the wrongdoer is maliciously intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the plaintiff's rights. *See Loucks v. Albuquerque National Bank*, 76 N.M. 735, 747, 418 P.2d 191 (1966). In the present case, the New Mexico Supreme Court reiterated and applied this standard in its review of the evidence. App. A, 7a.

In reaching the conclusion that there was sufficient evidence to support a finding that Ferrellgas and its employees were reckless, the New Mexico Supreme Court pointed out the extreme risk inherent in the type of work undertaken by Ferrellgas and the dangerous condition the automobile was in when it left Petitioners' control. The extreme risk of danger increased the Petitioners' duty of care. Specifically, the Supreme Court stated as follows:

> Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state. The circumstances define the conduct; a cavalier attitude toward the lawful management of a dangerous product may raise the wrongdoer's level of conduct to recklessness, whereas a cavalier attitude toward the lawful management of a nondangerous product may be mere negligence. In measuring punitive damages "the enormity and nature of the wrong" must be assessed. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989). We believe this is what the trial court had in mind when it indicated that the conduct of Ferrellgas rose to a

level of recklessness because of the dangerousness of the product. App. A, 7a.

In an attempt to manufacture a due process issue, Petitioners argue that the New Mexico Supreme Court announced unprecedented law when it viewed the acts of the Ferrellgas employees in a cumulative way, instead of isolating each reckless act for analysis. Petitioners are incorrect. The precedent in New Mexico amply demonstrates the appropriateness of viewing Petitioners' acts cumulatively, and it is important to note that Ferrellgas stipulated at trial that all of the acts of its employees were authorized by Ferrellgas. App. A, 6a. This stipulation eliminated any argument by the Petitioners that it should not be held accountable for the wrongful conduct of its employees. Given this stipulation at trial, the acts of its employees were the acts of Ferrellgas, and it only makes sense, therefore, to analyze those acts and omissions in a cumulative way.

The New Mexico courts adopted a standard of review for punitive damages awards which called for a cumulative evaluation of all the circumstances long before the occurrence of the events in this case. For example, in *Gray v. Esslinger,* 46 N.M. 421, 130 P.2d 24 (1942), the New Mexico Supreme Court noted that the defendant's violation of a traffic statute was a circumstance to be considered along with all of the other evidence in determining whether there was sufficient conduct to warrant an award of punitive damages. This evaluation of evidence in aggregate was reaffirmed by the New Mexico Court of Appeals in *Sutherlin v. Fenenga,* 111 N.M. 767, 810 P.2d 353 (Ct.App. 1991), and *DeMatteo v. Simon,* 112 N.M. 112, 812 P.2d 361 (Ct.App. 1991). In both cases, the appellate court

took care to reflect the numerous acts committed by the respective defendants, and concluded that all the acts, viewed collectively, supported the award of punitive damages. The New Mexico Supreme Court engaged in the same analysis in the present case, viewing all of the acts of Ferrellgas' employees in the context of the level of risk or prospect of harm attendant to the circumstances. The New Mexico Supreme Court properly applied existing legal standards, and the Petitioners' due process rights have not been violated. Petitioners, as licensed handlers of a dangerous product, were aware that a failure to follow safety regulations could result in severe harm. They knew that a vapor barrier and external venting were required by regulation and they knew of the Form 6 filing requirement. App. A, 4a. They knowingly did not comply with the safety regulations. App. A, 11a. It is ludicrous for Petitioners to argue that they had no notice that this reckless conduct could result in an award of punitive damages.

Punitive damage issues, particularly those involving sufficiency of the evidence, are state common law concerns. *See Molzof v. United States, supra.* It is ill-advised to take the matter of punitive damages and decorate the common law as if due process were at issue. *See TXO Production Corp v. Alliance Resources Corp,* ___ U.S. ___, 113 S.Ct. 2711, 2728 (1993) (Scalia, J., concurring in judgment). In fact, even the Petitioners did not brief or argue constitutional issues in this case on appeal[1] until they had lost all the common law and evidentiary issues in the Supreme Court of New Mexico.

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[1] Except for the single footnote previously mentioned.

CONCLUSION

This Court should deny certiorari since this case does not involve any constitutional issues nor any special or important question for review.

Respectfully submitted,

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8 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

REPLY MEMORANDUM 1

CONCLUSION 5

TABLE OF AUTHORITIES

Cases	Page
Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U.S. 673 (1930)	5
Dematteo v. *Simon*, 812 P.2d 361 (N.M. App. 1991)	2
Gray v. *Esslinger*, 130 P.2d 24 (1942)	2
Herron v. *Tribune Publishing Co.*, 736 P.2d 249 (Wash. 1987)	2
Horton v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985)	1
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994)	3
Pruneyard Shopping Center v. *Robbins*, 447 U.S. 74 (1979)	5
Sutherlin v. *Fenega*, 810 P.2d 353 (N.M. App. 1991)	2
Warford v. *Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990)	2
Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980)	4

Federal Constitutional Provision:

U.S. Const. amend. XIV (Due Process Clause)	1,5

REPLY MEMORANDUM

Ferrellgas, Inc. and Gilbert Candelaria file this reply to respondents' brief in opposition to certiorari.

1. Respondents do not dispute that Question 1 regarding the due process implications of retroactive imposition of punitive damages pursuant to a new standard of liability is important and worthy of this Court's review. Rather, respondents' only argument against certiorari on this question is that the New Mexico Supreme Court "did not adopt or apply any new or unique theory of liability in this case." Opp. at 7. That, however, is plainly and demonstrably incorrect.

The court below held that a corporation could be punished based on the "cumulative negligence" of two of its employees, even though neither employee's conduct constituted the kind of malicious, intentional or reckless conduct required to support punitive damages and, in fact, each employee was merely negligent. In fashioning this new theory and retrospectively applying it to punish Ferrellgas, the court did not cite a single prior New Mexico decision. Instead, it relied exclusively on the Kentucky Supreme Court's decision in *Horton* v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985), which is

apparently the only other decision in the country ever to adopt this theory as a permissible basis for punitive damages. Pet. App. 9a-14a.[1]

Although respondents now cite three New Mexico decisions, Opp. at 10, none of those cases applied a rule even remotely resembling the cumulative negligence theory. Indeed, the main case relied upon by respondents, *Gray* v. *Esslinger*, 130 P.2d 24 (1942), involved an individual, not a corporate defendant, and the only question was whether the individual's high-speed driving constituted "wanton and wilful" conduct that would support punitive damages. *Id.* at 28-29.

Nor did the other two cases cited by respondents, presage the cumulative negligence theory. *Sutherlin* v. *Fenega*, 810 P.2d 353 (N.M. App. 1991), was a malpractice case brought against a single, individual doctor. Similarly, *Dematteo* v. *Simon*, 812 P.2d 361 (N.M. App. 1991), involved the acts of a single employee whose own individual conduct constituted "utter indifference to the rights of others," and thereby subjected him to punitive damages. And both *Sutherlin* and *Dematteo* post-date the conduct at issue in this case, so they could not have provided notice of the

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[1] The court added a "Cf." cite to two libel cases from other jurisdictions, *Warford* v. *Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990) and *Herron* v. *Tribune Publishing Co.*, 736 P.2d 249 (Wash. 1987). But neither decision adopted a cumulative negligence theory and both were rendered *after* the conduct at issue in this case occurred.

cumulative negligence theory to Ferrellgas even if they had, in fact, adopted it.

In short, the New Mexico Supreme Court indisputably adopted and retrospectively applied a new rule of liability in this case to impose punitive damages against Ferrellgas. As this Court recognized last Term, such "[r]etrospective imposition of punitive damages . . . raise[s] a serious constitutional question," *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994), and the Court should grant certiorari to address that question in this case.

2. Respondents contend that the Court should not grant review of Question 2 -- whether the Due Process Clause prohibits the imposition of punitive damages for mere negligence -- because Ferrellgas' conduct was reckless, not merely negligent. *See* Opp. at 8-9. But there is no dispute that the sole basis for imposing punitive damages against Ferrellgas in this case was the conduct of Mr. Candelaria and his co-worker Mr. Schell, who were merely negligent. *See, e.g.*, Pet. App. 8a-9a, 14a. Indeed, respondents do not deny, and the record below makes clear, that no Ferrellgas employee engaged in conduct that constituted reckless or intentional behavior sufficient to support an award of punitive damages against Ferrellgas for its limited, preliminary work on the conversion of respondent Shella Snider's automobile to propane.[2]

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[2] Respondents assert that Ferrellgas can be deemed "reckless" because, in addition to the cumulative negligence of its

3. Finally, respondents vaguely complain that, in the New Mexico Court of Appeals -- where Ferrellgas prevailed on state law grounds -- Ferrellgas raised its federal due process challenge to punitive damages "in a minor footnote." Opp. at 5. Ferrellgas' articulation of its due process challenge was, however, sufficient to preserve the issue for purposes of this Court's jurisdiction. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (question properly preserved when raised in a single reference in the trial court to the "Florida Constitution and its federal counterpart"). Respondents do not contend otherwise.[3]

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employees, it allegedly violated safety and reporting regulations. Opp. at 11. Respondents, however, have been unable throughout the proceedings in this case to point to a single accident -- either before or after Ms. Snider's accident -- resulting from Ferrellgas' conversion of a vehicle to propane fuel. Indeed, Ms. Snider retrieved her car from Ferrellgas before it had completed the conversion and she had no problems at all with the car until four months later -- *after* an amateur auto-mechanic that had no connection to Ferrellgas had dismantled, repainted and reinstalled the propane tank that had been installed by Ferrellgas, and completed the conversion. To impose punitive damages against Ferrellgas based on these facts ignores entirely the concept of blameworthiness that purportedly authorizes state governments to impose these unlimited punishments in the first place.

[3] The New Mexico Supreme Court did not permit briefing and oral argument after it had granted respondents' petitions for review, which did not even raise the cumulative negligence issue. At its first opportunity, on rehearing, Ferrellgas

CONCLUSION

For the foregoing reasons and those set forth in the Petition, this Court should grant certiorari and set this case for plenary consideration.

January 20, 1995

Respectfully submitted,

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exhaustively addressed the due process issues raised by the court's unexpected adoption and retroactive application of the new cumulative negligence rule, thereby properly preserving the issues for review by this Court. *See, e.g., Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74, 86 n.9 (1979); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930). And, although respondents inexplicably assert that Ferrellgas did not raise the due process issue in its post-trial motions, Opp. at 4, Ferrellgas could not have been clearer on this point, explicitly contending in such motions that the "award of punitive damages violates the due process clause of the Fourteenth Amendment to the United States Constitution." Mem. In Support Of Motion For Judgment Notwithstanding The Verdict And New Trial, at 9.